

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

77-2137

To be argued by
STEVEN LLOYD BARRETT

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----x
LEON BUSH,

Petitioner-Appellant,

-against-

DAVID R. HARRIS, Superintendent,
Green Haven Correctional Facility,

Respondent-Appellee.
-----x

Docket No. 77-2137

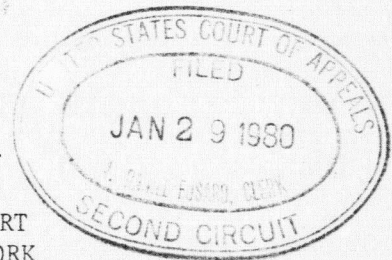
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BRIEF FOR APPELLANT

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ON APPEAL FROM AN ORDER
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK



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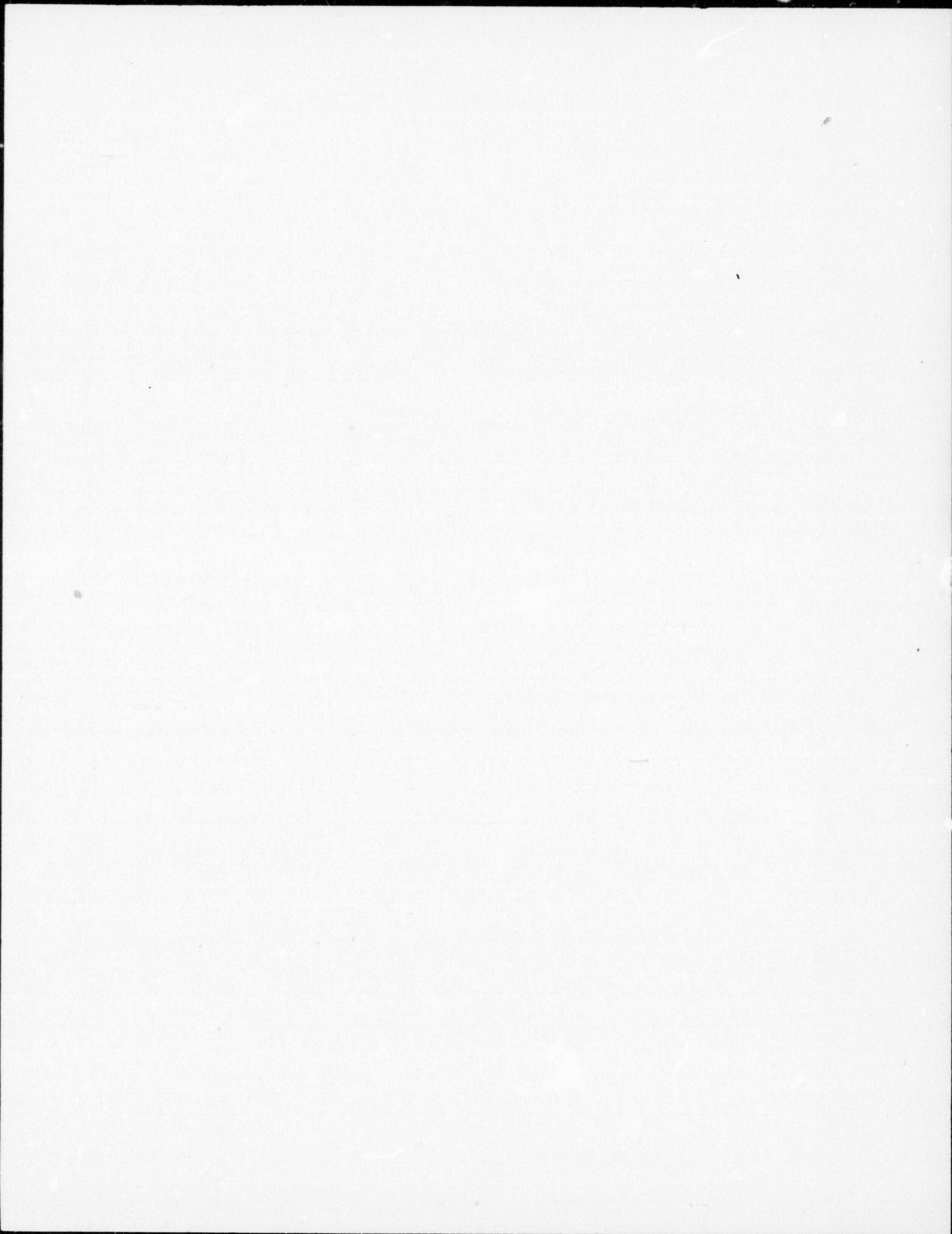
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LEON BUSH,
Petitioner-Appellant,
-against-
DAVID R. HARRIS, Superintendent,
Green Haven Correctional Facility,
Respondent-Appellee.

Docket No. 77-2137

ON APPEAL FROM AN ORDER
OF THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

Whether the rule of Wardius v. Oregon that a non-reciprocal notice-of-alibi statute violates due process should be held retroactive and applicable to this pre-Wardius trial, in which the State exploited the non-reciprocal provisions of the former New York statute to present its alibi rebuttal evidence through surprise witnesses and thereby frustrated effective surrebuttal and cross-examination.

STATEMENT PURSUANT TO RULE 28(a)(3), F.R.A.P.

PRELIMINARY STATEMENT

This is an appeal from an order of the United States District Court for the Eastern District of New York (Pratt, J.) rendered on August 7, 1979, after remand from a panel of Court (Anderson, Feinberg, and Timbers, C.JJ.) ordered March 2, 1978, adhering to an order of May 25, 1977, dismissing petitioner's application for a writ of habeas corpus. Petitioner was convicted of felony murder and second degree manslaughter on September 22, 1971, in the New York Supreme Court, Kings County, and is currently serving concurrent terms of fifteen years to life and fifteen years, respectively. By order dated September 28, 1977, Judge Pratt issued a certificate of probable cause to appeal and granted permission to appeal in forma pauperis. By order dated November 3, 1977, this Court appointed The Legal Aid Society, Federal Defender Services Unit, as counsel to petitioner on the first appeal, pursuant to the Criminal Justice Act. This office remained as counsel to petitioner upon the remand and all subsequent proceedings, pursuant to this Court's direction in its March 2, 1978, order.

STATEMENT OF FACTS

Petitioner Leon Bush was accused of the August 30, 1969, killing of Robert Wheeler in Brooklyn, New York. At the trial (Barshay, J., and a jury), the People established that Wheeler

had been killed, and introduced petitioner's written and oral confession. Petitioner's defense was alibi; the defense sought to prove that petitioner was in New Orleans with his family on August 30, 1969. At the time of this trial, New York's notice-of-alibi statute had non-reciprocal discovery provisions* -- the People were authorized to demand a list of the alibi witnesses and a summary of the alibi defense, without any requirement that they honor a subsequent defense demand for rebuttal witnesses and evidence. Relying on this statutory procedure, the People demanded and obtained petitioner's alibi witness list and produced several surprise rebuttal witnesses in response to petitioner's alibi; the rebuttal witnesses testified that they had seen petitioner in New York at times during which, according to petitioner's alibi witnesses, petitioner was in New Orleans. The jury convicted petitioner of felony murder and second degree manslaughter.

Throughout the state proceedings, petitioner argued that the non-reciprocal former notice-of-alibi statute constituted a deprivation of due process. His initial arguments were based upon the reasoning of Williams v. Florida, 399 U.S. 78 (1970), which had held a reciprocal notice-of-alibi statute constitutional with the strong suggestion that its reciprocity was

*The notice-of-alibi statute in effect when petitioner was tried was Code of Criminal Procedure §295-1. This statute was re-enacted in 1971, effective September 1, 1971, as Criminal Procedure Law §250.20. However, CPL former §250.50 was held unconstitutional as of June 11, 1973, the date of the Wardius decision, in petitioner's appeal to the New York Court of Appeals, People v. Bush, 33 N.Y.2d 921 (1973), cert. denied, 419 U.S. 848 (1974). The statute was amended, effective May 23, 1974, in accordance with the reciprocity requirements dictated by Wardius and Bush.

essential to this approval. During the pendency of the appeal to the New York Court of Appeals, Wardius v. Oregon, 412 U.S. 470 (1973), was decided; this case held that an Oregon statute, in effect identical to New York's former statute, denied due process because it provided for non-reciprocal discovery rights. In deciding petitioner's appeal, the New York Court of Appeals found the former notice-of-alibi statute unconstitutional under Wardius v. Oregon, but held its ruling exclusively prospective and denied petitioner any relief (People v. Bush, 33 N.Y.2d 921 (1973)).

A. Pre-Trial Proceedings

The People filed their demand pertaining to petitioner's alibi defense on August 17, 1970.* Counsel responded on August 19, 1970, seeking, inter alia, an order excusing petitioner from complying with the demand or directing the People to provide the defense with their rebuttal witnesses; the defense position was explained in counsel's affidavit as being based upon the unconstitutionality of the former New York statute due to its non-reciprocity, and Williams v. Florida, supra, was cited in support of that position. By order dated September 25, 1970, the court (Starkey, J.) denied petitioner's requests to excuse compliance or to compel counter-disclosure. Petitioner complied with the order on November 2, 1970, listing eleven alibi witnesses (with their addresses) and indicating that petitioner would claim that

*This and all subsequent pretrial motions discussed above were made available to the Court during the original appeal in this case.

he was in New Orleans on August 30, 1969.

Immediately after jury selection, on May 5, 1971, petitioner reiterated his opposition to the former New York statute on the grounds previously stated for the benefit of the trial judge, Justice Barshay (Justice Starkey had ruled on the pre-trial motion) (T.265-267).^{*} The defense concluded by seeking an order for the names of the People's rebuttal witnesses, noting that the People were fully aware of what the defense alibi would be; the court denied the request following this colloquy with the Assistant District Attorney:

THE COURT: From the context of fairness, is there any reason why you cannot do it, Mr. Levy?

MR. LEVY: Your Honor, these are people who are known to the defendant; and the statute has written out that it is not required.

THE COURT: He is attacking the constitutionality upon which I will not pass. I am not going to sustain that view. Have you got statements from these people?

MR. LEVY: Formal statements, no. I have spoken to two of them. I took notes. I have spoken to another one over the telephone. I would ask the Court to direct me at this time not to disclose their identities. They are all known to the defendant. I assure the Court of that.

(T.267-268.)

^{*}Numerical references preceded by "T" are to the state court trial transcript. The transcript, as well as the pre-trial motions referred to above, have been made available for this Court's inspection.

B. Alibi Evidence and Rebuttal*

Petitioner introduced evidence that on August 30, 1969, he was in New Orleans, through his own testimony and that of his brother, Donald Bush, and through five interrogatories of family members and friends in New Orleans.**

Petitioner testified that he left for New Orleans, where his family lived, on August 28, 1969, traveling by train (T. 545). He had been living in Brooklyn since January of 1969 (T.547); and after spending August 28 through December 19, 1969, in New Orleans, he returned to Brooklyn (T.549). It was shown that, in his grand jury testimony, petitioner had not recalled when he had left, conceding that it could have been in June or July, and that at the pre-trial suppression hearing, petitioner had said that he had gone to New Orleans "some time in August;" he determined that the exact date of his departure from Brooklyn was August 27 on the date of his trial testimony (T.568-571). He was in New York when Hurricane Camille hit (T.590).

*We have not summarized the prosecution or defense trial evidence relating to petitioner's confession since the question of the statement's voluntariness, originally advanced in the district court, is not raised here. We note that the statement was a confession (see T.323 et seq., 426 et seq.), that petitioner testified he was coerced into adopting an untrue account by police beatings (see T.554-566), and that the People's witnesses denied having beaten petitioner (see T.594-609).

**Justice Starkey, in his order of September 25, 1970, granted petitioner's request pursuant to Code of Criminal Procedure, Chap. 4, §§636-657, for issuance of a commission to take the testimony of the defense witnesses in New Orleans. William L. Krull, III, Esq., of New Orleans, was appointed, and defense interrogatories and prosecution counter-interrogatories were put to six witnesses and returned to the court and parties below. Donald Bush's interrogatory, one of the six, was not offered, since he testified at trial.

Donald Bush testified that he lived in New Orleans and left for California to seek employment on August 16, 1976, arriving there August 17; he went to San Diego and Los Angeles, where two brothers lived, and left California on August 28 to arrive back in New Orleans on August 29 (T.518-521, 529). He saw petitioner at about 1:00 p.m. on August 29 at their home; he recalled this because the trip to California had been his first, and he and petitioner spoke of how their two California brothers were doing (T.522).^{*} He also saw petitioner the following day, August 30, at home and at their father's service station (T.523). He did not recall the last time he saw petitioner before he left for California (T.525, 528, 531, 540); in response to an interrogatory, he said that petitioner was in New Orleans within the two or three weeks prior to August 29 (T.539), which was when Donald was in California (T.539-540). He remembered seeing petitioner for a continuous period up through October 31, the night of Halloween (T.542).

Five interrogatories in lieu of live testimony were offered by petitioner: Helen Bush, petitioner's mother (T.454-462); Alfred Williams, his brother-in-law (T.462-469); Patsy Bush, petitioner's wife (T.469-500); Vivian Williams, his mother-in-law (T.501-508); and Gerald Richardson, his second cousin (T.508-516). These five witnesses all placed petitioner in New Orleans on or around August 30, 1969. Helen Bush remembered

^{*}A Western Union receipt showed that Donald Bush had been wired money by his mother on August 28 while he was in California; this is the money he used to purchase an airline ticket. The receipt was admitted into evidence at trial (T.520-521).

that petitioner was in New Orleans on the last few days of August, because he had gone to New York for the first couple of weeks of August and was there when Donald Bush returned from California (T.455). Alfred Williams stated that petitioner was in New Orleans during the month of August; his chief recollection pertained to the middle of the month, but he "probably" saw him on the last few days (T.464, 467). Patsy Bush said that petitioner was at home with her on the night of August 30; on August 26, he had obtained a copy of their baby's birth certificate and had done other chores in the latter part of the month (T.470-471). Vivian Williams recalled that petitioner was in New Orleans on August 30 and was living next door to her, and she stated that petitioner helped her prepare for the storm (T.502). Gerald Richardson believed that petitioner was in New Orleans on August 30, since he remembered seeing him continuously between the time of the storm and Labor Day (T.509-510).

The People presented three surprise rebuttal witnesses to petitioner's alibi: Frank Rawitz, Della Curtis, and Miller Curtis.

Frank Rawitz owned a Brooklyn bar which petitioner frequented and in which petitioner often cashed checks (T.610). Rawitz saw petitioner twice during the month of August 1969, and on August 26, cashed a \$65 check for him (T.611-612). There was no cross-examination of this witness (T.612a-620).

Della Curtis owned an eleven-unit rooming house at 104 Park Place in Brooklyn, and during July 1969, petitioner moved into

the house (T.621-622). Mrs. Curtis saw petitioner all through the month of August, and in September up until September 16. On September 16, Mrs. Curtis' husband put petitioner out of the house for failing to pay his rent (T.623-624, 631). For the remainder of September and in October, Mrs. Curtis occasionally saw petitioner on the street in the vicinity of her house (T.625).

Cross-examination disclosed that Mrs. Curtis had been interviewed in November 1969 by a man who had said he was from the City and was investigating Leon Bush, and that this man took notes of the interview. However, the prosecutor disavowed any knowledge of either the interview or the notes, and because Mrs. Curtis had no recollection of the man's name, the issue was left hanging (T.624-627). She first brought her story to the attention of the trial prosecutor three weeks prior to her testimony -- on May 10, 1971 -- at the urging of her husband, but the reasons for her timing and the basis of her contacting the prosecutor remained a mystery (T.627-630).

Miller Curtis, Della's husband, stated that Gerald Richardson was his tenant and that around July or August, petitioner and another person moved in with him (T.635-636). They continued to live in the room until September 16 (T.638). Mr. Curtis also had occasion to see petitioner at the bar he managed, the one owned by Mr. Rawitz (T.635). During August of 1969, petitioner visited the bar two or three times a week, and Mr. Curtis saw him a total of three or four times a week between August 15 and September 16 (T.637-638). He also saw petitioner in October

and November (T.638-639).

On cross-examination, Mr. Curtis stated that his first conversation with the authorities about petitioner's presence in New York occurred the previous year and was with Officer McCarthy; Mr. Curtis did not know whether the officer had made any notes of the interview (T.643). The record reflects that McCarthy had not mentioned any such interview in his testimony. Mr. Curtis also disclosed that he had been interviewed by the prosecuting attorney several weeks prior to this testimony, and that the prosecutor had written the statement; at this time, the court ordered the prosecutor to permit defense counsel to inspect these notes (T.646). The writings disclosed that Mr. Curtis had told the prosecutor that he had gone to Puerto Rico on August 27 or 28, 1969 -- a fact which Mr. Curtis, at trial, characterized as "a mistake," and corrected to the same dates in 1970 (T. 647). He realized that it was a mistake when he arrived home from the interview; in his words, "I didn't do nothing about it" (T. 648-649). He advised the prosecutor of the error on the date of his testimony (T.649).

C. The State Appellate Decision

Petitioner appealed to the Appellate Division of the Supreme Court of the State of New York, Second Department, arguing, inter alia, that the non-reciprocal notice-of-alibi statute was unconstitutional, upon the reasoning of Williams v. Florida, 399 U.S. 78 (1970). The Appellate Division affirmed the judgment of conviction, 40 A.D.2d 591 (9172), without writing an opinion.

On appeal to the New York Court of Appeals, petitioner again pressed this claim; additionally, Wardius v. Oregon, 412 U.S. 470 (1973), which had been decided during the pendency of petitioner's appeal, was advanced in support of his claim that the non-reciprocal statute was unconstitutional. On December 28, 1973, the Court of Appeals decided petitioner's case (People v. Bush, 33 N.Y.2d 921).*

The court held that, there being no significant difference between Code of Criminal Procedure §295-1 and the Oregon statute considered in Wardius v. Oregon, supra, the New York statute must be deemed unconstitutional. The decision then considered the question of the retroactivity of this ruling; limiting its holding to cases in which the non-reciprocal notice-of-alibi statute had operated to compel one-sided (defense) disclosure and to allow the presentation of undisclosed prosecution rebuttal witnesses ("surprise witness cases") -- and expressly distinguishing cases in which failure to comply with the prosecution's demand for a witness list had resulted in preclusion of defense witnesses ("preclusion cases") -- the New York Court of Appeals held:

The statute operated only to deny defendant advance notice of the identity of these rebuttal witnesses, and to this extent to hinder his preparation to impeach, discredit or rebut their testimony. He was not, however, inhibited in his own opportunity by direct evidence to establish his alibi. The infringement of defendant's rights went only to a collateral though not unimportant issue. Thus,

*The decision of the New York Court of Appeals is reproduced in its entirety as B of the separate appendix to petitioner-appellant's brief.

we conclude that on this record the operation of the rule did not go to "the very integrity of the fact finding process;" rather it touched on procedural fairness to defendant.[*]

D. The District Court's First Decision

Petitioner filed his pro se application for a writ of habeas corpus in the United States District Court for the Eastern District of New York on September 10, 1976. The constitutionality of the former notice-of-alibi statute was again one of petitioner's points. Judge Pratt, to whom the petition was assigned, construed this claim as raising the retroactivity of Wardius v. Oregon. In a memorandum and order, Judge Pratt dismissed the petition.** On the question of retroactivity, he concluded:

The only rebuttal witnesses who contradicted the trial version of Bush's alibi were a Mr. and Mrs. Curtis. They testified that in the summer of 1969 they had rented a room to Bush's cousin, Gerald Richardson, that Bush had shared the room with Richardson during the latter part of the summer, and that Mr. Curtis had been forced to evict Bush and Richardson on September 16, 1969, for failure to pay the rent. Since Bush had previously testified to his presence in New Orleans during the entire month of September, 1969, defense counsel cross-examined both Mr. and Mrs. Curtis. Significantly, however, at no time did defense counsel move for a recess or a continuance in which to prepare his cross-examination of

*In a subsequent decision, People v. Morales, 37 N.Y.2d 262 (1975), the New York Court of Appeals held that the rule of Wardius v. Oregon should be accorded retroactive application in preclusion cases.

**The memorandum and order constituting Judge Pratt's first decision is reproduced as C of the separate appendix to petitioner-appellant's brief.

any of the three rebuttal witnesses. See Green v. Fogg, 422 F.Supp. 1034, 1036 (S.D.N.Y. 1976). Nor is there now any allegation of specific prejudice incurred by petitioner as a result of the State's refusal to disclose the identify [sic] of these witnesses prior to their testimony. See Mayer v. Moeykens, 373 F.Supp. 649, 654 (D.Vt. 1973), aff'd, 494 F.2d 855 (CA2), cert. denied, 417 U.S. 926 (1974).

. . .

A. Purpose of the New Standard

... Had application of the New York notice-of-alibi rule led to Bush's abandoning his alibi defense, the purpose of the Wardius doctrine might well have dictated a new trial, since the trial court's truth-finding function arguably would have been substantially impaired. See United States ex rel. Hairston v. Warden, 407 F.Supp. 524 (N.D.Ill.), rev'd on other grounds, 539 F.2d 713 (CA7 1976); People v. Bush, supra (dictum). Here, however, Bush was not deterred from presenting his alibi defense. Moreover, no continuance was requested, and no specific prejudice was then or has subsequently been alleged. Under such circumstances, the application of the unconstitutional notice provision in Bush's case should not be assumed to have "substantially" impaired the trial court's truth-finding functions....

B. Reliance

The Wardius doctrine was not clearly forecast by any prior decision of the Supreme Court. Indeed, in Williams v. Florida, 399 U.S. 78, 82 n.11 (1970), where the Court upheld Florida's reciprocal notice-of-alibi statute, it expressly noted that it was not deciding the constitutionality of N.Y. Code Crim. Proc. §295-1. Nor can it be said that the Wardius decision was clearly forecast by any trend of lower court decisions. Under such circumstances, legislative and judicial reliance on the New York notice-of-alibi provisions was justifiable.

C. Effect of Retroactive Application

Because that reliance began in 1935 when the provision went into effect, the retroactive

application of Wardius in cases such as this would almost certainly result in substantial interference with the administration of justice in New York, not to mention other states with similar statutes, e.g., Oregon and Illinois.

D. Conclusion

Since all three of the relevant criteria articulated by the Supreme Court indicate that Bush should not be allowed to benefit from retroactive application of the Wardius doctrine, his claim to the contrary is rejected.[*]

(App. C at 19-22.)

E. Disposition on Appeal to this Court

The undersigned was appointed by this Court to represent petitioner on his appeal. The brief and argument to this Court addressed the question of retroactivity of Wardius on the merits. However, the panel which considered this case (Anderson, Feinberg, and Timbers, C.JJ.) did not reach this issue; instead, the Court remanded the case to the district court for further consideration of whether petitioner suffered prejudice because of the State's non-disclosure of its alibi rebuttal witnesses. In a summary order entered March 2, 1978,** the Court said:

In this court, appellant argues that he suffered actual prejudice because of the State's refusal to disclose the identity of its alibi rebuttal witnesses, prior to their testimony. Appellant, who was not represented by counsel in the district court, apparently did not make this argument there. We remand

*The decision of the district court on the issue of retroactivity appears as Section X of the district court memorandum and order (at 16-22), which is reproduced as C of the separate appendix to petitioner-appellant's brief.

**This Court's order remanding the case to the district court for further consideration is reproduced as D of the separate appendix to petitioner-appellant's brief.

to allow him to do so, and we assume he will continue to be represented by appointed counsel.

The district court in its discretion may allow evidence to supplement the record of the State court proceedings and should consider and rule upon whether (1) there was actual prejudice to appellant, as claimed and (2) if so, whether such prejudice is constitutionally significant. Respondent-appellee is not foreclosed in the district court from making any of the contentions urged here.

(App. D at 1-2.)

F. Proceedings on Remand Before the District Court

Both parties agreed at a conference with Judge Pratt to proceed on remand upon affidavits instead of upon an evidentiary hearing with respect to prejudice to petitioner attributable to the surprise rebuttal testimony of the Curtises.

On October 31, 1978, two affidavits on behalf of petitioner were submitted to the district court.* In the first -- that of the undersigned as counsel to petitioner -- it was stated that "[p]etitioner's claim of prejudice is based on the unfair surprise which the State was able to effect by withholding the identity of its rebuttal witnesses." (App. E-1 at 3.) This claim was buttressed by the statements of petitioner's trial counsel, presented in the second of the affidavits: Arnold D. Roseman, Esq., stated that he had been shown papers from court files and "attempted to reconstruct some of my own thinking and actions which occurred some seven to eight years ago...." (App. E-2 at 1-2.)

*The two affidavits together are reproduced as E of the separate appendix to petitioner-appellant's brief: the undersigned's affidavit is E-1, and trial counsel's affidavit is E-2.

In this second affidavit, Mr. Roseman first reviewed his efforts to obtain even-handed disclosure of alibi and alibi-rebuttal witnesses. He showed that in response to the district attorney's demand for alibi evidence disclosure, he sought an order precluding his obligation to disclose under the former New York notice-of-alibi statute, Code of Criminal Procedure §295-1, on ground that the disclosure statute was non-reciprocal and therefore unconstitutional. (App. E-2 at 2.) This motion having been deried, Mr. Roseman renewed the motion prior to trial and again at the conclusion of trial testimony; on this latter date,

... I again called the attention of the trial court to the fact that I should have at the least been given this testimony two to three weeks before, at a time when the prosecutor said he already had learned of the existence and the prospective testimony of these witnesses. I am reminded that I also stated in substance to the court that I could have done a better job on cross-examination if I had been previously given the names of these rebuttal witnesses.

Mr. Roseman also provided a full description of the effect on his defense efforts of the Curtises' surprise testimony:

At the time Mr. Kimmins [defense investigator] made his preliminary investigation in this case, and in our private discussions, we had no idea that the two Curtises were to be called as rebuttal witnesses; had I been given such information at any time prior to trial, Mr. Kimmins, under my supervision and direction, would certainly have delved into certain areas testified to by the Curtises: (1) one that created a material discrepancy -- that they went to and were in Puerto Rico at the time of the homicide; (2) confirmation of Mr. Curtis' account of seeing petitioner in his bar in late August, to be gleaned from certain persons in the bar where he said he

worked; and (3) checking other matters that the Curtises had testified to, but all of which could not possibly be investigated in the limited time allotted to me and due to the necessity for a spontaneous cross-examination. It was difficult, if not impossible, to be able to immediately cross-examine two important rebuttal witnesses without a degree of intensive investigative preparation, as timewise, it could never serve as a predicate to attack a person's credibility on such short notice and in such limited time. In addition, other witnesses in the same bar in which Miller Curtis worked would have also been contacted, possibly found, and interviewed so as to be able to obtain some information to impeach Curtis.

(App. E-2 at 4-5.)

Mr. Roseman noted that he did not ask for a continuance following the direct testimony of the Curtises because it would not have remedied the harm from the surprise and would only have served to prejudice the jury against the defense:

... [I]f I had asked for a continuance then, after having at least partially attacked the credibility of the two Curtises with the then-meager information and material I had to work with, the defendant's case could easily have been jeopardized and the defendant made to look bad in the eyes of the jury were I to have asked for a continuance or an adjournment. Moreover, it would have served no useful purpose, because a short continuance for the purpose of looking into the backgrounds of these people and checking their direct versions could not have been accomplished in any period less than a week or ten days and my investigator could not have come up with anything worth utilizing in cross-examination. Probably if I had had the witnesses' names two or three weeks prior to trial, other witnesses or information might have been obtained by me which might have "impeached, discredited or rebutted their then trial testimony." I can only say now that the ability of an investigator and trial counsel to obtain information for use at a trial from persons like Della Curtis or Miller Curtis, in such a short period

of time as would have been allowed to me on a short continuance, even if it had been requested and granted, would have been quite difficult, if not impossible.

(App. E-2 at 5-6.)

The State responded in an affidavit dated November 8, 1978.* The State questioned petitioner's claim of surprise because the Curtises, as petitioner's landlords, were obvious prosecution witnesses to establish petitioner's whereabouts at the time of the crime. The State also stated that petitioner's trial counsel utilized cross-examination of the Curtises fully to elicit weaknesses in their testimony and that his failure to pursue questioning of Mr. Curtis as to his stay in Hawaii or Puerto Rico -- the key to his counter-alibi testimony -- was a matter of trial strategy. (App. F at 2-3.)

On November 22, 1979, the undersigned submitted a supplemental affidavit providing additional information respecting the Curtises' testimony.** It was noted that petitioner's current ability to contradict the Curtises' account that petitioner was in New York when he said he was in New Orleans had diminished significantly with the passage of time, and that therefore the question of prejudice to petitioner by reason of surprise could not rest solely upon what now could be proved as to the Curtises' whereabouts during August 1969. Nonetheless, this affidavit sought to discuss the state of the evidence currently available so as to establish a context for evaluating prejudice based on

*The State's affidavit is reproduced as Appendix F, from which the exhibit to that affidavit (the State's brief on appeal to this Court in petitioner's first appeal) is deleted.

**Counsel's affidavit is reproduced as Appendix G, from which the accompanying memorandum of law is deleted.

the record. (App. G at 1-2.)

The affidavit showed that neither of the Curtises could be examined as witnesses; Della Curtis had died, and Miller Curtis had sold his house in Brooklyn and left New York State, without leaving a forwarding address. The affidavit recited that, in a telephone conversation on November 1, 1978, arranged through Miller Curtis' attorney, Mr. Curtis refused to provide any information respecting his address or telephone number, and though he promised to discuss the matter further on November 6, 1978, he failed to call back as promised. As to Mr. Curtis' recollection about his whereabouts in August 1969, counsel's affidavit relates the following, which summarizes the November 1, 1978, telephone conversation:

Curtis stated that he and his wife travelled extensively between 1969 and 1974. As to the first stop in 1969, Curtis provided the following information at various times in the conversation: Hawaii was the first stop; the Curtises may have travelled to Puerto Rico before the "big trip" to Hawaii; he did not recall which was the first trip; the trip to Hawaii was at approximately the beginning of October of 1969. An important fact not included in his trial testimony was that he and his wife went to Puerto Rico twice during this period; he did not recall the dates. He had no recollection of the airline on which he travelled to Puerto Rico; he had no records of payment for airline tickets or other materials from which that could be determined, but indicated that he and his wife may have flown TWA, since his wife had had a TWA credit card. When the Curtises stayed in Puerto Rico, they stayed at the Geronimo Hotel in San Juan and remained for between a week and ten days.

Toward the end of the conversation, Curtis said that he was sure that he was in Puerto Rico in 1969, and reiterated that he had gone there a second time also. When I reminded him

that he had said he went to Hawaii in 1969, Curtis said that he had not meant Puerto Rico, but Hawaii, in his immediately preceding statement.

(App. G at 2-3.)

Counsel's affidavit also describes the unsuccessful efforts of a Legal Aid Society investigator, Edward Clay, to determine the dates of the Curtises' trips to Puerto Rico. Mr. Clay found that neither airline nor hotel records indicated any visits by the Curtises (App. G at 3.)

Annexed to the affidavit was a copy of the notes of police officer McCarthy reflecting the conversation with Mr. Curtis in which the latter stated that he was in Puerto Rico in August of 1969. These notes, which reflect that Mr. Curtis had referenced his trip to Puerto Rico to other events unequivocally occurring during the period of 1969 in question, indicate the following:

Gerald Richardson (Eddie's brother) rented a room there [Curtis' house] in Aug. 68. In May or June of 1969, Eddie R. moved in with Gerald. A couple of days later, LB [Leon Bush] moved in. During the summer, all 3 of them stayed there. Saw LB just about every day in and around the house and in the bar. He [Curtis] went to Puerto Rico on either 8/27 or 8/28 -- He saw LB between the time that Mr. Rawitz cashed the check and the time that he left. Returned from Puerto Rico on Sept. 4 or 5 -- Bush was still there. He evicted all 3 of them on 9/6.

(App. G exhibit; emphasis added.)

G. The District Court's Second Decision

In a memorandum and order dated August 7, 1979,* Judge Pratt found that "petitioner did not suffer actual prejudice in

*The second decision is reproduced as H of the separate appendix to petitioner-appellant's brief.

connection with the testimony of the alibi rebuttal witnesses. (App. H at 1-2.) In so ruling, the district judge rejected petitioner's claim "that he suffered actual prejudice because the element of surprise left him unable to prepare and conduct an effective cross-examination of the alibi rebuttal witnesses who offered damaging testimony ... [and that this] is a particularly compelling situation because it appears from the record that their testimony was susceptible to attack." (App. H at 4.)

After summarizing the evidence on the record relating to the contradictions in the Curtises' testimony as to their whereabouts during August 1969 -- whether they were in New York and thus in a position to state that petitioner was in New York and hence not in New Orleans, or whether they were in Puerto Rico and thus not in a position to establish petitioner's location on that key date -- the district judge concluded: "The truth of the Curtises' whereabouts at the time in question thus remains unknown." (App. H at 7.) Nonetheless, the court found no evidence of actual prejudice attributable to the non-disclosure of the identity of the Curtises prior to trial, because

[a]s to Mrs. Curtis, petitioner has not pointed out any additional impeaching information he would have uncovered had she been identified in advance of trial, thus leaving us merely to speculate as to what the claimed prejudice might have been.

Similarly, as to Mr. Curtis, petitioner points to not even one additional fact which would have been available at trial if advance identification had been made. Mr. Curtis gave a plausible explanation for telling the prosecutor he had been in Puerto Rico during part of the period that he testified petitioner was in

New York. If petitioner now presented some evidence that Mr. Curtis was in Puerto Rico at that time, then prejudice would have to be assumed. But there is no such evidence.

(App. H at 7-8.)

The district court further found that "petitioner [had not] diligently pursued the question either before or at the trial." (App. H at 9.) The court believed that the Curtises, who were petitioner's landlords, might have been called by petitioner as defense witnesses to buttress his alibi that he was out of town; and that in any event petitioner should have anticipated that they would be called to testify on the alibi issue. The district court also noted that petitioner did not request a continuance after the direct examination of the Curtises though their "testimony came well before the end of the trial." (App. H at 9.)

Judge Pratt also rejected petitioner's claim of prejudice on the ground that while "some questions were left unanswered," these related not to "direct issues of guilt, but [to] the collateral claim of alibi" and specifically to the Curtises' credibility. (App. H at 10.) The court noted:

... [F]or the jury to believe the rebuttal witnesses would not necessarily have led to a conviction, since the prosecution still had to prove the elements of the crime itself, not just the fact that the defendant was present in New York. Similarly, even if defense counsel were successful and the rebuttal witnesses were disbelieved, an acquittal would not necessarily have resulted, since the jury could have chosen to disbelieve the alibi witnesses as well (in this case, petitioner's family members and friends), and

reached their decision on the other evidence in the case.

Finally, there were other factors in this case which the jury had to consider, not the least of which was a voluntary confession by the petitioner, admitted into evidence at the trial.

(App. H at 10-11.)

ARGUMENT

THE RULE OF WARDIUS v. OREGON THAT A NON-RECIPROCAL NOTICE-OF-ALIBI STATUTE VIOLATES DUE PROCESS SHOULD BE HELD RETROACTIVE AND APPLICABLE TO THIS PRE-WARDIUS TRIAL, IN WHICH THE STATE EXPLOITED THE NON-RECIPROCAL PROVISIONS OF THE FORMER NEW YORK STATUTE TO PRESENT ITS ALIBI REBUTTAL EVIDENCE THROUGH SURPRISE WITNESSES AND THEREBY FRUSTRATED EFFECTIVE SURREBUTTAL AND CROSS-EXAMINATION.

The State's utilization of New York's former notice-of-alibi statute in this case to withhold disclosure of rebuttal witnesses while benefiting from full defense disclosure effected a substantial infringement of petitioner's due process rights. Because of the non-reciprocal nature of this statute, petitioner was unfairly confronted by several surprise rebuttal witnesses whose testimony, contradicting petitioner's alibi, was among the most damaging evidence presented by the prosecution. Had petitioner been given advance notice of these rebuttal witnesses, he would have been in the same position the prosecution had been in vis-à-vis his alibi witnesses: he would have been able to formulate a meaningful trial strategy and

conduct the necessary investigation upon which an effective cross-examination could be based.

The Supreme Court, in Wardius v. Oregon, 412 U.S. 470 (1973), recognized the unfairness inherent in a non-reciprocal discovery statute identical to New York's former statute, and held that the enforcement of such a statute violated a defendant's due process rights. It was in petitioner's case before the New York Court of Appeals that New York followed suit by declaring its statute unconstitutional. People v. Bush, 33 N.Y.2d 921 (1973), cert. denied, 419 U.S. 848 (1974). However, the New York Court of Appeals denied petitioner relief* by declaring its ruling exclusively prospective from the date of Wardius v. Oregon.

This argument will proceed on three points. First, it will be shown that New York's rule on Wardius' retroactivity is flawed in that it rests on the inaccurate assumption that no defendant claiming unfairness in the State's presentation of surprise alibi rebuttal witnesses can establish the interests necessary to retroactive application of Wardius. Second, the three-pronged retroactivity test will be applied to the

*Federal courts generally make prospective rulings retroactive to the extent of permitting the litigant in the case in which the new constitutional procedure is announced to benefit from the ruling. In Stovall v. Denno, 388 U.S. 293, 301 (1967), the Court noted: "That they [litigants in cases resulting in prospective ruling] must be given that benefit is, however, an unavoidable consequence of the necessity that constitutional adjudications not stand as mere dictum." Though this reasoning would appear equally applicable to a state decision, the principle is grounded in Article III of the Constitution, which requires a case or controversy, see Note, Prospective Overruling and Retroactive Application in the Federal Courts, 71 Yale L.J. 907, 930-933 (1962). The New York Constitution has no case or controversy clause, and New York courts are free to render advisory opinions.

Wardius ruling and it will be demonstrated that Wardius should be allowed retroactive application. Third, the precise harm to petitioner attendant to the State's presentation of surprise rebuttal witnesses will be considered to prove that the prejudice to petitioner makes this case one in which retroactive application of Wardius is appropriate.

I. New York's Categorical Distinction Between Preclusion Cases And Surprise Witness Cases For Purposes of Wardius' Retroactivity Should Not Be Adopted.

Petitioner's appeal to the New York Court of Appeals resulted in the decision (People v. Bush, 33 N.Y.2d 921 (1973)) which held New York's former notice-of-alibi statute unconstitutional. However, petitioner was denied relief when the court also announced a retroactivity decision with respect to the new rule announced in Wardius v. Oregon: the rule of Wardius was to be applied prospectively from the date of Wardius with respect to trials in which the defendant was permitted to present his pre-disclosed alibi defense and was subsequently surprised by the State's alibi rebuttal evidence. The court reserved as a separate question the retroactivity of Wardius in cases in which the former notice-of-alibi statute resulted in preclusion of the defendant's alibi defense due to defense failure to comply with the pretrial disclosure requirements; and shortly thereafter, in People v. Morales, 37 N.Y.2d 262 (1975), the court held the ruling retroactive in such cases. Thus, New York has

fashioned a categorical rule which denies retroactive application of Wardius in all surprise witness cases regardless of proof that this surprise was exploited to effect severe prejudice to a defendant.

The division between preclusion cases and surprise witness cases is entirely irrational. In applying the standards for determining the retroactivity of Wardius (Point II, post), the considerations will be the same and hence the result should be the same, regardless of the form of unfairness which was manifested by the non-reciprocal and unconstitutional notice-of-alibi rule. New York's determination that Wardius will be retroactively applied only in a preclusion case both misconceives the three-pronged retroactivity test and rests upon the factually inaccurate premise that there can be no material prejudice to a defendant who has disclosed his alibi defense to the State without reciprocal discovery of rebuttal evidence and who is subsequently unable to respond to this evidence with adequate cross-examination due to surprise. Wardius v. Oregon was a preclusion case itself, but the decision in no way suggests that that form of unfairness is necessarily of greater moment than the unfairness of a surprise rebuttal witness. The Court noted:

It is fundamentally unfair to require a defendant to divulge the details of his own case while at the same time subjecting him to the hazard of surprise concerning refutation of the very piece of evidence which he disclosed to the State.

Wardius v. Oregon, supra, 412 U.S. at 476; emphasis supplied.

The New York retroactivity rule as to Wardius thus appears

rooted in a misconception. Ironically, the New York Court of Appeals, in holding Wardius retroactive in preclusion cases, identified the very factors which require retroactivity in surprise witness cases:

A sine qua non of such a [fact-finding] process is the making available of relevant and trustworthy evidence which the parties seek to adduce in support of their respective contentions.... It is most relevant that the witness provisions of the Sixth Amendment are coupled with the one guaranteeing the right to counsel; right to counsel decisions are among those which have most commonly been deemed retroactive [citations omitted].

People v. Morales, supra,
37 N.Y.2d at 269-270.

"[R]elevant and trustworthy evidence" is evidence which has been subjected to cross-examination (see Davis v. Alaska, 415 U.S. 308, 316 (1974)); and from the standpoint of constitutional prominence, the confrontation clause stands alongside the compulsory process clause. Though it is a direct and substantial interference with the fact-finding process to prohibit a criminal defendant from presenting alibi evidence, the inability to investigate a key prosecution witness and to structure effective cross-examination can prove equally devastating to the goal of truth determination. Cf. Roberts v. Russell, 392 U.S. 298 (1968) (Bruton v. United States, 391 U.S. 123 (1968), held retroactive); Berger v. California, 393 U.S. 314 (1969) (Barber v. Page, 390 U.S. 719 (1968), held retroactive).

This Court has not yet passed on the issue of the retroactivity of Wardius, but the question was presented in Jackson

v. Fogg, 389 F.2d 103, 110-111 n.5 (2d Cir. 1978). There, the conviction of Jackson was reversed on ground of suggestiveness of the State's identification procedures, and the Court noted:

The Court in Wardius gave no indication as to whether its decision was to be applied retroactively, and the New York Court of Appeals declined to apply Bush to cases the trial of which began before the decision in Wardius, except where application of the notice of alibi statute resulted in the exclusion of alibi evidence.

... In view of our holding that the conviction cannot stand because the State's case was so tainted by the identification procedures and the testimony resulting therefrom, we need not deal with the interesting questions of prejudice and retroactivity that Judge Broderick's holding presents.

Judge Broderick's ruling is reported at 465 F.Supp. 177 (S.D.N.Y. 1978) and, in that decision, the district court held that (a) Wardius was a ruling which should be held retroactive (id., 465 F.Supp. at 192-193) and (b) Jackson had been sufficiently prejudiced to warrant reversal of his conviction (id., 465 F.Supp. at 193). These two issues will be further explored in the forthcoming two sections of this brief; but for purposes of this point, it bears noting that the district court issued its ruling in a surprise witness case -- not a preclusion case -- and thus rejected New York's rule that Wardius was to be applied retroactively in all preclusion cases but prospectively in all surprise witness cases.

The New York Court of Appeals decision in the instant case rejected the retroactivity of Wardius not upon the proper analysis of Wardius' purpose and effect, but upon an artificial and

unsound distinction between cases in which the non-reciprocity of the former New York statute resulted in unfair surprise and those in which it resulted in preclusion of defense witnesses. This Court should not be bound by this erroneous approach to the question of retroactivity; instead, it should proceed, as did the district court in Jackson, first to apply retroactivity standards to Wardius to determine whether it may be applied retroactively and, if the standards are found to favor retroactivity, then to determine whether the prejudice to petitioner was sufficient to warrant retroactive application of Wardius in this case.*

*We believe that Judge Broderick's decision in Jackson v. Fogg provides the most definitive reported ruling on the question of retroactivity in Wardius. In Mayer v. Moeykens, 373 F.Supp. 649, 654 (D.Vt. 1973), the district court declined to hold Wardius retroactive in light of the lack of prejudice, the features distinguishing the Vermont statute from the Oregon statute, and the liberal Vermont discovery rules; there was not a full-scale discussion of retroactivity. On appeal (affirmed, 494 F.2d 855 (2d Cir.), cert. denied, 417 U.S. 926 (1974)), this Court noted that counsel had conceded on oral argument that the argument had no merit and there was no discussion of retroactivity (494 F.2d at 859). In Jenkins v. Atkins, 515 F.2d 1078 (10th Cir. 1975), the court never reached the issue, for the case turned on an exhaustion question. In United States ex rel. Hairston v. Warden, 407 F.Supp. 524 (N.D. Ill. 1976), the district court held that Wardius v. Oregon must be applied retroactively; however, that decision was reversed on other grounds (539 F.2d 713 (7th Cir. 1976)).

II. Application Of The Three-Pronged Stovall Test

Favors Retroactive Application of Wardius.

Stovall v. Denno, 388 U.S. 293, 297 (1967), formalized the three-pronged test first referred to in Linkletter v. Walker, 381 U.S. 618, 629 (1965), as follows:

The criteria guiding resolution of the question [of retroactivity] implicate (a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards. [*]

The first of the criteria -- the purpose to be served by the new standards -- is "foremost," and the factor upon which most cases focus. Desist v. United States, 394 U.S. 244, 249 (1969). And, "[w]here the major purpose of the new constitutional doctrine is to overcome an aspect of the criminal trial that substantially impairs its truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials, the new rule has been given complete retroactive effect." Williams v. United States, 401 U.S. 646, 653 (1971). Application of the three criteria demonstrates that Wardius should be permitted retroactive application regardless of whether the non-reciprocal statute effected unfair preclusion or unfair surprise.

Purpose. Wardius sought to correct a fundamentally unfair procedure whereby a defense intending to offer proof of alibi

*See Johnson v. New Jersey, 384 U.S. 719 (1966); Tehan v. Shott, 382 U.S. 406 (1966).

could do so only at the expense of being subjected to rebuttal proof for which it would be ill-prepared to respond. This decision, by requiring reciprocal disclosure of prosecution rebuttal witnesses, effected a significant change relating to fact-finding: it facilitated sound investigation and preparation for cross-examination of prosecution rebuttal witnesses and thereby afforded the defense a realistic opportunity to assess the rebuttal account, to seek independent contradicting or impeaching evidence, and to expose any fallacies in the testimony. Thus, in Jackson v. Fogg, Judge Broderick concluded "that the purpose of the Wardius rule was to eliminate the lack of preparation and consequent surprise that resulted from one-way discovery." 465 F.Supp. at 192. The defense, in other words, can put the rebuttal witnesses to the test which Wigmore has called "beyond all doubt the greatest legal engine ever invented for the discovery of truth."* One-sided secrecy which impairs cross-examination stalls this legal engine; Wardius, which eliminates this impairment, thus effects a substantial impact on the process of truth-determination.

The accuracy of fact-finding in adversary proceedings emanates from the roughly equivalent procedural postures of the contestants (cf. In re Winship, 397 U.S. 358, 361-364 (1970));

*Wigmore, as quoted in Lloyd Paul Stryker, THE ART OF ADVOCACY 73 (1954); see also 5 Wigmore, EVIDENCE §§1365, 1367, 1395, 1397 (Chadbourn rev. 1974). The Supreme Court has expressed similar sentiments. Davis v. Alaska, 415 U.S. 308, 316 (1974); see also United States v. Fitzpatrick, 437 F.2d 19, 23 (2d Cir. 1970) ("Full and fair cross-examination is the cornerstone of the adversary system").

thus, in Wardius, supra, 412 U.S. at 475, the Court remarked, "The State may not insist that trials be run as a 'search for truth' so far as defense witnesses are concerned, while maintaining 'poker game' secrecy for its own witnesses." New York's former statute, by placing the defense at a distinct disadvantage as to the cross-examination of the prosecutor's rebuttal witnesses, upset the requisite balance, leaving the defense ineffectual. Infringement of the right to counsel upsets this balance in an analogous fashion; and the relation of an effective defense to truth determination is evident from the fact that right to counsel decisions have uniformly been held retroactive. E.g., McConnell v. Rhay, 393 U.S. 2 (1968) (Mempa v. Rhay, 389 U.S. 128 (1967), held retroactive); Gideon v. Wainwright, 372 U.S. 335 (1963) (held itself retroactive); Douglas v. California, 372 U.S. 353 (1963) (held itself retroactive); Hamilton v. Alabama, 368 U.S. 52 (1961) (held itself retroactive).

The district court below, in concluding that the purpose factor did not favor retroactivity, recalled the surprise witness/preclusion dichotomy created by the New York Court of Appeals: "Had application of the New York notice-of-alibi rule led to Bush's abandoning his alibi defense, the purpose of the Wardius doctrine might well have dictated a new trial, since the trial court's truth-finding function arguably would have been substantially impaired. [Citation omitted.] Here, however, Bush was not deterred from presenting his alibi defense." (App. C at 21.) This conclusion can be accepted only if the aforementioned effects on the fact-finding process of lack of preparation and impaired

cross-examination are to be denied.

Reliance. The analysis and conclusions of the district court in Jackson v. Fogg, which cite directly to the findings of the New York Court of Appeals in People v. Morales, supra, reflect a sound assessment of the reliance factor:

... I find that the matter has been settled by the New York Court of Appeals, and that there has been no extensive reliance by New York law enforcement authorities upon the pre-Wardius standard. In People v. Morales, 37 N.Y.2d 262, 372 N.Y.S.2d 25, 333 N.E.2d 339 (1975), Judge Fuchsberg, for a unanimous court, stated that "there appears to have been no significant degree of reliance on our notice-of-alibi statute by law enforcement authorities in general, or prosecutorial authorities in particular, so as to adversely affect the administration of justice through retroactive application of the Wardius rule." Id. at 270, 372 N.Y.S.2d at 32, 333 N.E.2d at 344.

465 F.Supp. at 192.

Furthermore, law enforcement authorities should not be permitted to claim reliance on an unfair procedure when that procedure has never been expressly approved by the courts and when that procedure's demise has been "clearly foreshadowed" by a decision of the United States Supreme Court. Johnson v. New Jersey, 384 U.S. 719, 731 (1966); see Berger v. California, supra, 393 U.S. 314; cf. Desist v. United States, supra, 394 U.S. at 248. Williams v. Florida, 399 U.S. 78 (1970), which petitioner advanced from the earliest stages of this prosecution to the moment Wardius was decided, anticipated the holding of Wardius. That the Court, upholding a reciprocal notice-of-alibi statute, was compelled to postpone ruling on a non-reciprocal statute such as New York Code of Criminal Procedure §295-1 does

not establish that the Court's intentions as to such a statute were not foreshadowed. Mr. Justice White noted:

Florida law provides for liberal discovery by the defendant against the State, and the notice of alibi rule is itself carefully hedged with reciprocal duties requiring state disclosure to the defendant.

Id., 399 U.S. at 81; footnotes omitted; emphasis added.

* * * *

We do not, of course, decide that each of these alibi-notice provisions is necessarily valid in all respects; that conclusion must await a specific context and an inquiry, for example, into whether the defendant enjoys reciprocal discovery against the state.

Id., 399 U.S. at 82, n.11; emphasis added.

Contrary to the view of the district court in its first opinion, these comments gave strong signals that the Supreme Court viewed reciprocity in a notice-of-alibi statute to be essential to the statute's constitutionality.

Effect. The district court concluded in its first decision that, because the non-reciprocal provision went into effect in 1935, "the retroactive application of Wardius in cases such as this would almost certainly result in substantial interference with the administration of justice in New York...." This assumption fails to take into consideration a number of factors which would severely limit the effect of a ruling in favor of retroactivity.

One major limitation is the restrictive factual context required to raise a genuine Wardius problem: (a) the State had

to have served a demand for an alibi witness list, which is not invariably done in every case; (b) the defense had to have presented an alibi defense (unless precluded from doing so for non-compliance with the State's demand); (c) the State had to have presented a counter-alibi rebuttal witness who had not been disclosed to the defense. Further limitations pertain to harmless error and waiver: if it were shown that the defense knew of the prosecution rebuttal witnesses independently, or was not seriously harmed by the testimony of those witnesses, there would be no basis for relief; and if the defense failed to seek disclosure of the State's rebuttal witnesses, any claim cognizable by Wardius would have been waived. Therefore, there is every reason to believe that few cases would be affected by a ruling that Wardius is retroactive and that any adverse effect on the administration of justice from such a ruling would be minimal.

Indeed, this was the conclusion Judge Broderick reached in Jackson v. Fogg, again basing his findings on those of the New York Court of Appeals in People v. Morales:

The Morales court, in considering this very question, noted that neither party, in that case, had "directed our attention to even a single other reported or pending case involving excluded alibi testimony under the old statute." Id. To this date, the only cases similar to petitioner's in New York that the parties at bar have cited to me are Bush, [United States ex rel.] McCroory [v. LaVallee, 75 Civ. 6104 (S.D.N.Y. 1977)], and Green [v. Fogg, 422 F.Supp. 1034 (S.D.N.Y. 1976)]. Indeed, although Wardius has been in effect for five years, the litigation on this issue has

been sparse. In my judgment, the "substantial interference with the administration of justice" predicted by respondent will not come to pass.

465 F.Supp. at 193.

Moreover, petitioner has contested the ruling of the New York Court of Appeals in his direct appeal that Wardius is fully prospective. Thus, retroactive application may be restricted to cases which were on direct appeal on the date of Wardius, further reducing the effect on the administration of justice of full retroactivity. (See Desist v. United States, supra, 394 U.S. at 257 (Harlan, J., dissenting).)

III. Petitioner Was Severely Prejudiced By The State's Use Of Surprise In Connection With Its Presentation Of The Alibi Rebuttal Witnesses.

The question of prejudice turns on whether petitioner was denied sufficient opportunity to prove that the discrepancies in the Curtises' testimony represented not minor memory failings, as claimed, but false statements which undermined their counter-alibi testimony in its entirety. Should this Court agree that the rule of Wardius may be applied retroactively, petitioner's conviction should be reversed, for this case reveals the extent of prejudice that can accompany surprise and confirms the threat to truth-elicitation which attends thwarted cross-examination. Though the district court found -- wrongly, as we shall show -- that petitioner was not prejudiced by the operation of New York's non-reciprocal notice-of-alibi statute in this case, we concur in one significant finding: "The truth of the

Curtises' whereabouts at the time in question thus remains unknown." This acknowledgment alone proves that petitioner was severely prejudiced by the severe handicap under which cross-examination of the Curtises was conducted.

While the Curtises did not present direct evidence as to petitioner's guilt of the crime charged, their testimony was of incalculable damage to petitioner's defense. The question before the jury was whether the State's evidence of petitioner's inculpatory statements should be credited as truthful and the statements themselves as voluntary, or whether petitioner's alibi defense should be accepted. The Curtises' testimony provided the jury with an easy diversion. There being insufficient proof by the defense that the Curtises were in Puerto Rico on the date in question, petitioner's alibi evidence would be viewed by a jury as at least tainted by the Curtises' testimony, and thus insufficient to overcome the police testimony of a confession. The district court's dismissal of the importance to the defense of disproving the Curtises' accounts as "focus[ed] not on the direct issues of guilt, but on the collateral claim of alibi" and as pertaining merely to "the witnesses' credibility" rather than to the very truth of their accusatory testimony (App. H at 10) misapprehended the true impact of the Curtises' testimony in the context of this case. Moreover, the court's observation that belief or disbelief of the Curtises' statements that petitioner was in New York at the time of the murder would not "necessarily" have dictated the verdict (App. H at 10-11) advances logic to the exclusion of the realities of the jury

process.

In determining whether petitioner was prejudiced by the surprise attendant to the presentation of the Curtises, the assessment of damage must relate to the situation which existed at trial. Thus, when the district court conditioned a finding of prejudice on current proof that the Curtises' account was erroneous -- "If petitioner now presented some evidence that Mr. Curtis was in Puerto Rico at that time, then prejudice would have to be assumed. But there is no such evidence." (App. H at 8) -- it imposed an inappropriate and insurmountable burden on the defense. As detailed in our affidavit below (App. G), such proof is now impossible: Mrs. Curtis is dead and Mr. Curtis is uncooperative and unavailable; there are no airline records; and the hotels, as well as any files, no longer exist. But what is true ten years after the fact does not reflect the situation during petitioner's trial. Cf. Drope v. Missouri, 420 U.S. 162, 183 (1975) ("the inherent difficulties of such a nunc pro tunc determination under the most favorable circumstances"); Pate v. Robinson, 383 U.S. 375, 387 (1966) ("the difficulty of retroactively determining"). Sufficient notice of the rebuttal evidence would have permitted the defense at trial to send its investigator to Puerto Rico to investigate the dates of the Curtises' visit at a time when such an investigation would likely be fruitful; it would have allowed the defense to obtain records of Officer McCarthy or other officers regarding undisclosed interviews with the Curtises a year before trial; and it would have provided the opportunity to interview the Curtises prior to

their testimony, to obtain from them the names of others who would also have been witness to petitioner's presence at Curtis' bar as alleged by Mr. Curtis, and to develop new witnesses who could contradict or impeach the Curtises' testimony.

The district court's suggestion that these shortcomings on petitioner's behalf were due not to the unfair surprise sprung by the State but to trial counsel's lack of diligence before and at trial does, we respectfully submit, indulge in second-guessing with benefit of hindsight. Counsel's efforts were devoted to proving that petitioner was in New Orleans, and his time and energy were spent developing proof from New Orleans witnesses. Even assuming that counsel had a duty to seek confirmation of this alibi through independent sources, it is unreasonable to expect him to have undertaken proof of a negative -- that petitioner was not in New York. And even if this, too, was his obligation, it does not follow that his search for evidence would have inexorably led to petitioner's landlord. The proper test for unfair surprise in the context of a criminal defense should focus not on whether an occurrence is conceivably predictable, but on whether it should reasonably be foreseen. Under this standard, genuine surprise with respect to the presentation of the Curtises as rebuttal witnesses for the prosecution cannot be refuted.*

*Defense counsel Roseman's affidavit (Appendix E) indicates counsel's surprise at the State's rebuttal testimony and his inability to pursue those avenues of investigation which, with adequate opportunity, might have dis-

(footnote continued on the following page)

The evidence of prejudice before the district court and now before this Court is not speculative. We have come forward with sufficient evidence, both from the record and from additional sources, to prove, as the district court found, that "some questions were left unanswered" (App. H at 10) and that "[t]he truth of the Curtises' whereabouts at the time in question thus remains unknown" (App. H at 7). We have, moreover, provided trial counsel's statement that the surprise in this case debilitated any effort to delve into the questions raised by the Curtises' testimony. Thus, while not guaranteeing that the defense would have succeeded in proving that the Curtises were in Puerto Rico on the date in question, we have shown a "reasonable possibility" that trial counsel could have so discredited the Curtises' account (see Fahy v. Connecticut, 375 U.S. 85, 86-87 (1963); United States ex rel. Hetenyi v. Wilkins, 348 F.2d 844, 864-867 (2d Cir. 1965); see also Chapman v. California, 386 U.S. 18, 23-24 (1967)). That the district court

(Footnote continued from the preceding page)

closed significant cross-examination materials. Moreover, Mr. Roseman's affidavit addresses his failure to request a brief continuance after the Curtises testified. The decision not to seek a continuance was based on the realization that such a delay would have emphasized the dramatic impact of the Curtises' testimony on the jury and that any reasonable continuance would not have been adequate to investigate the witnesses' direct testimony. Cf. Green v. Fogg, 422 F.Supp. 1034 (S.D.N.Y. 1976), where the State's surprise evidence consisted of a weather report; defense counsel's task on investigation was simply to confirm this weather report, and a brief continuance would have been adequate. By contrast, the matters to be investigated regarding the Curtises' testimony were numerous and intricate, and a brief continuance would not have sufficed. Adequate time here would have been the pretrial period during which the State had notice of petitioner's alibi defense, or at least from the beginning of the trial. Cf. United States v. Floyd, 555 F.2d 45, 48 n.7 (2d Cir.), cert. denied, 434 U.S. 851 (1977).

imposed an altogether unreasonable standard for prejudice in this case is evident upon consideration of Judge Borderick's decision in Jackson v. Fogg, supra, 465 F.Supp. at 193-194. The defendant's claim of surprise in that case did not cite substantial evidence that the very essence of the rebuttal case was untrue; the claims there, which led the district court to a finding of constitutionally significant prejudice, were far more general and speculative than those raised by petitioner here.

[Jackson], on the other hand, takes the position that Mr. Kellam was caught completely by surprise as a result of the statute. He argues, in effect, that the production of Gorr and the introduction of the time cards without advance warning threw the defense into disarray, destroyed the credibility of the alibi witnesses, and created a false impression in the minds of the jurors that the petitioner had attempted unsuccessfully to orchestrate a fabrication. He further argues that, aside from the damage caused at trial, his case was prejudiced by the statute at the outset in that it compelled him to choose between putting in an alibi defense (with the concomitant risk of destructive surprise) and foregoing the alibi evidence entirely, and points out that this is the form of prejudice with which Wardius was primarily concerned.

I am satisfied that, procedural considerations aside, petitioner sustained material substantive prejudice of constitutional dimensions from the requirements of the alibi statute. The state's surprise rebuttal evidence effectively destroyed the credibility not only of the truck driver Carter, at which it was directed, but also of the other alibi witnesses, Washington and Moses. If defense counsel had known that the rebuttal evidence would be offered, he could have dealt with it in his examination of Carter, or he could have proceeded with two instead of three alibi witnesses, eliminating Carter.

(Footnote omitted.)

Everything said in this analysis about the effect of surprise on defendant Jackson's case may be said analogously about the effect of surprise in the case sub judice. But moreso, petitioner can state, with the concurrence of the district court, that the truth of the rebuttal evidence is in doubt, and further that opportunity to investigate and prepare prior to the direct testimony of the Curtises may have proved their testimony to be utterly false. We have thus sufficiently proved petitioner prejudiced by the non-reciprocal operation of New York's former notice-of-alibi statute, and Wardius should be applied retroactively to this case.

CONCLUSION

For the foregoing reasons, the order of the district court should be reversed and the writ of habeas corpus issued.

Respectfully submitted,

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CERTIFICATE OF SERVICE

January 29, 1980

I certify that a copy of this brief and appendix
has been mailed to the United States Attorney for the
Eastern District of New York.

Stanley L. Baner

